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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 935

THE RIVERSIDE PRESS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

LOCAL 267, DALLAS-FORT WORTH LITHOGRAPHERS AND PHOTOENGRAVERS INTERNATIONAL UNION, AFL-CIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is set forth in the Petition as Appendix B thereto and is reported at 415 F. 2d 281.

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1. The above caption differs from that found in the Petition because of Petitioner's failure to designate Local 267, Dallas-Fort Worth Lithographers and Photoengravers International Union, AFL-CIO, as a Respondent in this case, despite the fact that by order dated March 28, 1968, the Court of Appeals for the Fifth Circuit granted Respondent Union's motion to intervene. In this respect, of course, the Petition fails to comply with Supreme Court Rule 21(6).

JURISDICTION.

The jurisdictional allegations set forth in the Petition are correct.

QUESTIONS PRESENTED.

1. Is a party entitled to a hearing in an unfair labor practice proceeding when all relevant facts have either been determined in prior representation proceedings or are not in any way controverted?

2. In the absence either in briefs or oral argument in support of a Petition for Review of any argument questioning in any way the adequacy of certain findings of the Board, is a Court, confronted with such a petition, which raises only a narrow procedural issue, and a cross-petition for enforcement, required to examine, *sua sponte*, the whole record in order to determine that those findings are supported by substantial evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to those cited in the Petition, the following statute is relevant:

National Labor Relations Act, as amended, Section 6, 29 U. S. C. 156, 61 Stat. 140:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

STATEMENT OF THE CASE.

While the Statement of the Case found in the Petition (pp. 3-6) outlines in skeletal form the proceedings to date, it is replete with significant omissions which Respondent believes are sufficiently important to be called to the attention of the Court.

The election in this case, which occurred on September 27, 1966, was held pursuant to a Decision of the Regional Director finding an appropriate unit and directing an election following a hearing on July 11, 1966. That hearing was conducted pursuant to Section 9(c)(1) of the Act.[2]

The election resulted in an inconclusive vote, as four ballots were challenged by Respondent Union on the ground that the voters were supervisors. Those ballots were sufficient to affect the results of the election.

Thereafter, Petitioner communicated with the Regional Director urging that the challenges be overruled. In support of that contention Petitioner stated, as reported by the Trial Examiner, that

> the record in the representation case "conclusively establish[es] that all matters relating to the supervisory hierarchy of the Employer were fully litigated [and determined] in the representation hearing" (Appendix B-29).

Petitioner went on to urge that, if the Regional Director disagreed with its position as to the challenges,

> . . . *the Employer requests that the Regional Director designate a hearing officer and schedule a hearing for the purpose of determining the status of the employees whose ballots were challenged* (Appendix B-29-B-30) (Emphasis added).

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2. The Labor Management Relations Act, 1947, as amended, 61 Stat. 136, 29 U. S. C. Sec. 151 *et seq.*, will be referred to hereinafter as "the Act."

Then, as Petitioner states, the Regional Director issued his Supplemental Decision and Order on December 2, 1966, ruling in Petitioner's favor with respect to two of the four challenged ballots. When those two ballots were counted, the vote still was inconclusive.

Consequently, the Regional Director, pursuant to Section 102.69 of the Board's Rules and Regulations, directed that a hearing be held "for the purpose of making credibility resolutions, findings of fact and recommendations going to their supervisory status" (R. 45).[3] Section 102.69 *inter alia,* provides for post-election hearings "when it appears that substantial and material issues of fact exist which can be resolved only after a hearing . . ." Section 102.69(d) further provides that, at the conclusion of such hearing, the hearing officer shall "cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues".

Thereupon, in a memorandum to the hearing officer, dated January 21, 1967, Petitioner again took the position that the supervisory status of the employees "was fully inquired into at the hearing herein of July 21, 1965 [actually July 11, 1966] . . ." (R. 137).

Petitioner appeared at the hearing now being questioned, which it had specifically requested, and was afforded "full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues" (R. 48). At that hearing Petitioner introduced an exhibit in the form of a motion setting forth its contention that the hearing was contrary to law "as the matter had been litigated at a prior representation hearing" (R. 55). *No objection was made prior to or during the hearing as to its form or as to the request of the Regional Director that*

3. "R." references are to the pleadings, decision and order of the Board, printed as Volume I, Transcript of Record.

the Hearing Officer make credibility resolutions, findings of fact, and recommendations.

On February 9, 1967, the Hearing Officer filed his report on the remaining two challenges, ruling that both employees were supervisors. Petitioner duly filed its exceptions which in no way challenged the form of the hearing or the fact that the Hearing Officer made credibility resolutions, findings of fact, and recommendations. Thereupon, the Regional Director filed his Second Supplemental Decision and Certification. That Decision disagreed with the recommendation of the Hearing Officer as to one of the ballots and ruled that it should be counted. It affirmed the Hearing Officer with respect to the ballot of Andrew Schilling, concluding that he was a supervisor, noted that the vote favored the Union, and duly certified it as the representative of the employees in an appropriate unit.

Thereafter, in due course, followed Petitioner's Request for Review, its denial by the Board, the Union's Charge Against Employer, the Complaint and Notice of Hearing, the Petitioner's Original Answer, the General Counsel's Motion to Strike Portions of that Answer and Motion for Judgment on the Pleadings, the Order Referring the Motion to Trial Examiner for Ruling, and the Trial Examiner's Order to Show Cause on the Motions of the General Counsel (R. 73-117). In none of these documents does Petitioner raise, nor is there any mention of, an objection to the form of the hearing or to the fact that the Hearing Officer made credibility resolutions, findings of fact, and recommendations.

On October 9, 1967, Petitioner filed its "Response to Order to Show Cause on Motion of General Counsel to Strike Portions of Answer and on Motion for Judgment on the Pleadings" (R. 118-34). In that document Petitioner asserts, *for the first time,* its contentions that it is entitled

to a hearing before a Trial Examiner on the status of Andrew Schilling, that the post-election hearing before the hearing officer was improper, unauthorized, and illegal, and that the hearing officer had totally exceeded his authority by making credibility resolutions, findings of fact, and recommendations. Significantly, there was no discussion in that document as to the appropriateness of the unit, although Petitioner denied it "in order that it may preserve such point for judicial review" (R. 120).

Thereafter, on November 21, 1967, the Trial Examiner issued his Intermediate Decision and Recommended Order, concluding that Respondent "has refused to bargain collectively in violation of Section 8(a)(5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act". In that decision, which will be considered more fully later, the Trial Examiner addressed himself to each of Petitioner's contentions, some of which are raised again in this Court (Appendix B-28-B-43).

Following Petitioner's "Exceptions to the Trial Examiner's Decision", the Board, on February 8, 1968, issued its Decision and Order affirming in all respects the decision of the Trial Examiner (Appendix B-43-B-44).

Petitioner thereupon filed its Petition for Review in the Court of Appeals for the Fifth Circuit, and the Board cross-petitioned for enforcement. In its petition in that court, Petitioner again chose not to press the issue of the adequacy of the evidence to support the conclusion of the Regional Director as to the status of Schilling (Appendix B-7). The Court of Appeals affirmed the Decision and Order of the Board and thereafter denied Petitioner's request for rehearing (Appendix B-7-B-27).

REASONS FOR DENYING THE WRIT.

Petitioner seeks to raise three issues. First, it asks whether objections to elections may be resolved in a post-election hearing, which, as Petitioner points out, is not specifically provided for by statute but is provided for in the Board's Rules and Regulations. Secondly, it asks whether findings and conclusions made in such a hearing may be binding in a subsequent unfair labor practice proceeding. Finally, Petitioner argues that, despite the fact that it did not in any way challenge or question the appropriateness of the unit before the Court of Appeals, the court nonetheless was obligated to determine whether the Board's order was "supported by substantial evidence on the record as a whole" (Petition p. 2).

It is the position of Respondent Union that none of these questions, particularly in light of the particular facts of this case, warrant the granting of a Petition for Certiorari.

1. The First Issue Raised by Petitioner Is Not Before The Court and Is Wholly Without Significance.

The first issue raised by Petitioner concerns the propriety of resolving objections to an election in a post-election hearing. Both the majority and the dissent in the Court of Appeals held that Petitioner had waived any such issue by specifically requesting the hearing now questioned and by failing to make a timely objection thereto. Moreover, the court held that, in any event, such an assertion was "frivolous in the light of the Board's wide discretion in fulfilling its section 9(c) function of certifying election results" (Appendix B-4; B-10).[4] Clearly, this issue is wholly without significance.

4. Such hearings, of course, are expressly provided for by the provisions of 29 C. F. R. § 102.69(c), promulgated pursuant to authority given the Board in Section 6 of the Act. Moreover,

2. The Second Issue Raised by Petitioner Is a Well-Settled Point of Law and Petitioner Advances No Reasons Why It Should Be Changed.

The second issue raised by Petitioner, namely, whether findings and conclusions made in such a hearing are binding in a subsequent unfair labor practice proceeding, was also decided adversely to Petitioner by both the majority and the dissent in the Court of Appeals (Appendix B-4-B-7; B-9-B-10).

Although Petitioner casts the issue as one concerning the standards of evidence applied in unfair labor practice as opposed to representation hearings, it is clear that essentially what is being urged is nothing but a variant of an argument which has been heard and rejected in numerous cases. Petitioner simply wants to "relitigate" that which has already been determined in the prior representation proceedings. It, of course, is manifest that if the status of Schilling had been determined in the *pre-election* representation hearing, which also would not have been conducted in accordance with the rules of evidence which obtain in the United States district courts, Petitioner could not relitigate that issue in a subsequent unfair labor practice proceeding. *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 85 L. ed. 1251, 61 S. Ct. 908 (1941). The Court of Appeals could perceive no reason why a different result should obtain "in view of the 'so far as practicable' language of Section 10(b)[5] and the representa-

such hearings have been commonly held for 17 years without challenge by Congress, during which time the Act has twice been amended.

5. Section 10(b) of the Act in pertinent part provides: "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . ."

tion nature of the issue involved in the post-election hearing in this case" simply because the hearing in this case was a post-election one and it determined to "abide by the long line of cases that have found the representational determinations to be binding in a later unfair labor practice proceeding" (Appendix B-4-B-5).[6]

Here Petitioner has been given, *at its request,* a hearing in which it vigorously participated. Despite ample opportunity, Petitioner has nowhere indicated how different rules of evidence would or could have any substantial effect on the outcome of these proceedings.

The issue here is not novel and repeatedly has been resolved by the courts adversely to Petitioner. It clearly does not warrant review.

3. The Final Issue Raised by Petitioner Arises Solely by Virtue of the Unique Facts of This Case and Is Without Significance to the Administration of the Act.

The final issue raised by Petitioner relates to the proper standard of review to be applied by the reviewing court. It was this issue which occasioned the dissent in the Court of Appeals. It is framed as follows in the Petition:

> 3. Does a "cursory look" at the record by the Court of Appeals before enforcing a Board order under section 10(e) of the Act meet the clear statutory requirement that Board orders must be supported by substantial evidence on the record as a whole?

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6. The Court of Appeals distinguished *Heights Funeral Home, Inc.* v. *N. L. R. B.*, 385 F. 2d 879 (5th Cir. 1967) and *Amalgamated Clothing Workers* v. *N. L. R. B.*, 365 F. 2d 898 (D. C. Cir. 1966), noting that the issues involved therein were not precisely related to the earlier representation hearing. In this case, the court noted, "the supervisory status of Schilling was the key issue in the post-election proceeding, was vigorously contested, and was focused in terms of the validity of the union victory" (Appendix B-7).

That statement of the issue neglects to take into account the fact that Petitioner filed a Petition for Review of the Board's Decision and Order under Secion 10(f) of the Act *prior to* the Board's application for enforcement under 10(e). In that Petition for Review and in its brief and oral argument in support thereof it chose not to raise the question of the appropriateness of the unit, *i.e.*, Schilling's status. Both the majority and the dissent agreed that by that action Petitioner had waived its rights to contest the supervisory issue before the court (Appendix B-7-B-8; B-10). Under those rather unique circumstances, the analogy of the majority in regarding the situation as comparable to consent seems persuasive. And if that is the case, the standard of review adopted by the majority is clearly correct.

In any event, this issue is of the most peripheral character and the frequency with which it might arise is obviously very limited. It calls for an employer, actively litigating an unfair labor practice case, to decline for some reason to raise the substantive issues either in its Petition for Review or in its reply to the Board's Application for Enforcement. Such an occurrence may safely be regarded as isolated. Indeed, Judge Godbold, who in authoring the dissent, raised the issue, was not of the opinion that the issue warranted an *en banc* hearing by the Fifth Circuit (Appendix, B-23-B-24).

CONCLUSION.

For the reasons stated we respectfully request that this Court deny a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case.

Respectfully submitted,

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